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Wise Replacements for NWP 26?

Will the Corps' proposed replacements for Nationwide Permit 26 accomplish the agency's twin goals: wetlands protection and a reduced regulatory burden? Here an environmentalist and lawyers for the regulated community give their reactions to the Corps' long-awaited proposal.

By Julie Sibbing

With the U.S. Army Corps of Engineers' 1996 announcement that Nationwide Permit 26 would be phased out by the end of 1998, many in the conservation community expressed relief that the Corps had finally recognized the adverse impacts resulting from the widespread use of this permit. Therefore, it was with great disappointment that we read the Corps' recent proposal for replacement permits which, if adopted, will only further weaken protection of our country's wetlands and other waters.

Instead of fine-tuning the general permit program to create truly activity-specific permits that would result in no more than minimal impact, the Corps expanded the nearly-automatic approval process to include even more activities and types of waters than ever before. The six newly proposed permits and proposed expansions to six existing permits would open up to expedited permitting millions of additional acres of wetlands and other waters than the permit they are designed to replace. While the Corps workload may be reduced, wetlands, rivers, lakes and streams — and the humans and wildlife that benefit from them

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By Virginia S. Albrecht and Kim Diana Connolly

The continental United States comprises approximately two billion acres of land, including 104 million acres of wetlands and about 34 million acres of "other waters." In Fiscal Year 1995 (October 1, 1994-September 30, 1995), the U.S. Army Corps of Engineers issued permits that authorized impacts to 26,300 acres of wetlands or other waters while requiring 45,900 acres of mitigation. Of the total acreage authorized, 5,020 acres (slightly less than 1/5 of the total) were permitted through Nationwide Permit 26, with mitigation of 5,809 acres. The average NWP 26 authorization resulted in 0.36 acres of impact.

Acceding to the views of some that too many wetlands were being lost through the NWP 26 "loophole," the Corps in 1996 reduced the ceiling on NWP 26 from 10 acres to three acres, and pledged that it would terminate NWP 26 altogether at the end of two years, replacing it with "activity-based" permits by the end of 1998. The Corps is now in the process of developing those replacement permits, and the results so far are not pretty. The July 1 *Federal Register* proposal inflamed environmental advocacy

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Editor's Note

Comments were due August 31, 1998, for the Corps' "Proposal to Issue and Modify Nationwide Permit 26" (NWP 26 covers discharges to headwaters and isolated wetlands). The Corps has proposed six activity-specific permits to replace NWP 26. Those permits include: residential, commercial, and institutional activities; master planned development activities; stormwater management facilities; passive recreational facilities; mining activities; and reconfiguration of existing drainage ditches. In addition, the Corps proposed modifications to existing NWP 3 (Maintenance), NWP 7 (Outfall Structures and Maintenance), NWP 12 (Utility Activities), NWP 14 (Linear Transportation Crossings), NWP 27 (Stream and Wetland Restoration), and NWP 40 (Agricultural Activities). A chart summarizing the changes appeared on page 18 of the July-August *National Wetlands Newsletter*.

According to the Corps' proposal (which was published in the *Federal Register* July 1, 1998), "These NWPs will allow the Corps to prioritize its work on nontidal waters based on the quality of impacted aquatic systems and the specific impacts of a proposed project. . . . This proposal is a reflection of the Corps' unequivocal commitment to its environmental mission and to wetlands protection. The Corp is also committed to reducing regulatory burdens where possible. . . . This NWP also reflects this commitment."

5. The Corps lacks meaningful data and scientific analysis on the potential impacts of the newly proposed/expanded nationwide permits. District offices have not been required to keep vital information on impacts to wetlands under the old NWP 26. Without these data, the Corps has no way to predict the potential impacts of these proposed permits. Data used in the proposal to show how much mitigation was accomplished for impacts under the current NWP 26, for example, are highly misleading. What appears to be very impressive net gains in wetland acreage actually includes acres of wetlands avoided by some projects and acres of existing wetlands preserved or enhanced as per the Corps definition of mitigation (63 *Federal Register* 36076).

In the past and under most of the proposed permits, no reporting is required for impacts of under 1/3 acre. It is impossible, therefore, for the Corps to determine the cumulative impacts of the new permits when they are not keeping track of projects under 1/3 acre or under 500 linear feet.

6. Regional conditions are not a solution. The Corps has proposed to provide for "regional conditions" on the new permits. Although some Districts may work to ensure that strong conditions are placed upon the use of these permits, others will not. Although the Corps' claims that regional conditioning will ensure that the permits do not result in more than minimal impact, there is little actual incentive for districts to adopt strong conditioning. These resources are referred to as "waters of the United States" because they are resources of national importance. Our country's lakes, wetlands, rivers, and streams deserve a basic, minimal level of protection at the national level that does not depend upon the particular characteristics of the local Corps District within which they are located.

7. The Vice President's Clean Water Action Plan is undermined. The Corps' proposal would undermine the Vice President's Clean Water Action Plan. Among the goals of this plan are to halt wetland losses and eventually achieve net gains of 100,000 acres of wetlands a year by the year 2005 — a goal that will be impossible to achieve if the Corps' proposal is adopted. Bold, visionary goals such as the net gain in wetland acreage proposed by the Vice President's Clean Water Action Plan should be promoted and assisted by all segments of our government.

The conservation community is united in its opposition to the Corps proposal. People and communities in every state rely on the clean water and flood reduction benefits of wetlands, and numerous species of wildlife depend upon the continued availability of wetland habitats for their survival. These and many other wetland functions are important to a healthy economy and a healthy environment. ■

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groups as well as private and public sector entities who are subject to Section 404 permit requirements.

The environmental advocates decried the Corps' proposal to expand the reach of the replacement permits to all non-tidal waters, rather than limiting them to isolated and headwaters areas. It is ironic that many of these same organizations criticized the old NWP 26 because it treated such areas differently from all other waters. They also voiced concern about proposed Permit B, Master Planned Development Activities. Permit B would authorize up to 10 acres of impacts for master planned development projects that are "designed, constructed, and managed to conserve and enhance the functions and values of water of the United States" at project sites greater than 500 acres. The would-be permittees complained that 1) the Corps' proposal imposes regulatory burdens that are out of proportion to the environmental impacts of these small projects, and 2) the new requirements effectively gut the streamlined aspects of the NWP Program, contrary to Congress' intent in authorizing nationwide permits.

The July 1 proposal is chock-full of new policy initiatives that merit thoughtful consideration by all Section 404 stakeholders. For example, the Corps has included a proposal akin to the Endangered Species Act's "safe harbors" concept, which has been so effective in motivating conservation efforts by private landowners. The safe harbors principle recognizes that the Corps' current policies discourage landowners from allowing wetland conditions to develop on their property, lest they subject themselves to burdensome regulatory requirements. Under the Corps' proposal, in certain limited circumstances, the Corps would provide a "safe harbor" for landowners who allow wetlands to develop on their property, meaning that any wetland that emerged through documented voluntary efforts would not trigger Section 404 requirements. This sensible approach is good for the environment and property owners.

Other issues that require thoughtful consideration include:

- **The extension of the "no net loss" policy to nonwetland waters:** Ever since George Bush proclaimed it during the 1988 presidential campaign, the goal of the Section 404 program has been "no net loss of wetlands functions and values." The July 1 proposal restates the goal of "no net loss of aquatic resource functions and values." Given that the "aquatic resource" base includes dry washes, agricultural ditches, and stormwater channels, and given that the application of "no net loss" results in rigorous mitigation requirements, this shift in policy has serious implications that should be debated by elected officials as well as agency administrators.

- **Mitigation requirements that go well beyond the Corps' statutory authority:** The Notice appears to claim the authority to require mitigation for activities that the Corps cannot regulate (such as flooding, excavation, and drainage). In addition, the

Corps will “normally require vegetative buffers, including upland areas adjacent to open waters,” as mitigation for such impacts. This letter requirement is apparently based on concerns about water quality impacts. But the Corps does not have authority to regulate activities in upland areas, no matter how deeply felt the concerns. Moreover, the Clean Water Act has assigned water quality responsibility to the states.

- **A proposed new water quality general condition that seriously overreaches the Corps’ statutory authority and that effectively trumps the states’ water quality authority:** The proposal suggests that a new general condition be tied to the replacement permits under which permittees would be required to implement a water quality management plan to protect and enhance aquatic resources. The water quality management plan may consist of stormwater management techniques and/or the establishment of vegetative buffer zones. It is questionable whether the Corps has the authority to require such water quality measures, since under the Clean Water Act, water quality issues are generally left to the states. Moreover, Section 402 of the Clean Water Act addresses stormwater management efforts, so the Corps’ involvement in this area would be redundant.

- **A proposed expansion of the definition of tidal wetlands:** The term “tidal waters” traditionally has been defined to mean waters that occur below mean high water. The Corps’ July 1 proposal extends tidal waters/wetlands to “the normal spring high tide” (i.e., further inland than mean high water) and by implication would extend the Corps’ regulatory authority under Section 10 of the Rivers and Harbors Act as well. This could have significant implications, because the Corps often takes the position that dry land that has been diked off from tidal flow nonetheless remains subject to Section 10 (unless the government has waived its authority). Thus, areas that are not wetlands or otherwise subject to Section 404 of the Clean Water Act nonetheless remain within the ambit of federal authority under Section 10. In short, it appears that there is some significant mission creep going on here.

Further exacerbating the significant problems that these issues and others will cause for citizens subject to Section 404 jurisdiction is the regional conditioning process that is currently underway. When it published the replacement permit proposal in the *Federal Register*, the Corps indicated that a “regionalization process” would help ensure that minimal-impact requirements would be met. Under this proposed process, different Corps districts around the country are supposed to suggest conditions that would be appropriate for their districts, then the divisions are supposed to fashion regional conditions that will apply to the nationwide permits. The timing of this process, and the method of notifying the public with respect to the proposal, created a logistical nightmare. (District notices were sent only to people on

preexisting Corps mailing listings, and were not even made available at a single Internet site or published in the *Federal Register*. Some of the notices were issued less than two weeks before the end of the comment period. The nightmare qualities are evident when one looks at the chart depicting “Nationwide Permit 26 Replacement Milestones,” on page 36047 of the Corps’ proposal, which bears a strong resemblance to a wiring diagram for a 1952 Alfa Romeo.) Comments were due on the nationwide proposal before the regional conditions were even proposed. Regional conditions that have already been suggested by certain districts, however, would place contradictory restrictions on the nationwide program. This backward approach to comments meant that even the most diligent commenters could not garner sufficient information to develop an understanding of the entire proposal. In order to satisfy the Administrative Procedures Act and the Clean Water Act requirements for public involvement, the Corps should reopen the public comment period for the permit package as a whole once the regional conditions have been proposed, to allow for a meaningful “feedback loop” so that stakeholders can have the opportunity for meaningful comment that is guaranteed under the law.

Taken as a whole, the replacement permit package reflects a disturbing trend toward effective elimination of the streamlined general permit process. Onerous conditions and hurdles in the proposal would seriously undermine Congress’ goals in enacting Section 404(e). And the Corps achieves little or no environmental gain to compensate for the regulatory pain. The Corps should rethink its proposal to ensure that it not only protects valuable wetlands, but at the same time is fair and flexible to citizens subject to Section 404 jurisdiction. ■

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